

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**SANDRA JANE HOWARD**

Claimant

VS.

**GOODWILL INDUSTRIES EASTER SEALS  
OF KANSAS, INC.**

Respondent

AND

**FIRSTCOMP INSURANCE COMPANY**

Insurance Carrier

Docket No. 1,033,400

**ORDER**

Claimant appeals the March 19, 2009, preliminary hearing Order of Administrative Law Judge Bruce E. Moore (ALJ). Claimant was denied additional medical treatment for her low back and right hip complaints after the ALJ determined that claimant had failed to establish her need for additional treatment was the result of the July 19, 2006, injury to her left foot and ankle.

Claimant appeared by her attorney, Andrew L. Oswald of Hutchinson, Kansas. Respondent and its insurance carrier appeared by their attorney, Jennifer L. Arnett of Overland Park, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held August 5, 2008, with attachments; the December 15, 2008, independent medical evaluation (IME) report of independent medical examiner orthopedic surgeon Kris Lewonowski, M.D.; and the documents filed of record in this matter.

**ISSUES**

1. Did claimant prove, by a preponderance of the medical evidence, that, as a result of a compensable work-related left foot injury, and the

resulting treatment, she aggravated or accelerated preexisting low back and right hip conditions?

2. Does the Board have jurisdiction over the appeal of this matter from a preliminary hearing Order?

#### FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant worked as a team leader for respondent when, on July 19, 2006, she stepped on an unidentified object and her foot slid across the floor. Claimant did not fall, but she injured her left foot. Claimant continued to work, but later her foot and ankle began to swell and she developed increased pain. Claimant initially sought treatment with Jeff L. Thode, M.D., of the Hutchinson Clinic. X-rays indicated the foot was not broken. A boot was placed on claimant's left foot. She was later referred by respondent to a podiatrist, David E. Canter, D.P.M., of the Hutchinson Clinic, who treated her until December 2006, using a boot and a cast on her foot and ankle. When her foot and ankle did not improve, she was referred to foot and ankle specialist, Steven Howell, M.D. After a period of conservative care, claimant underwent reconstructive surgery on her left foot and ankle, consisting of an osteotomy of her calcaneus and posterior tibial tendon reconstruction with an FDL transfer and an Achilles lengthening to the left foot, on July 16, 2007. Follow-up care was provided, with a second surgery to remove hardware from her left heel in June 2008.

Claimant was limited in the amount of weight she could place on her left foot for several months. As a result, claimant alleges that she began experiencing pain in her low back and right hip. Claimant has been advised that she currently needs a hip replacement in her right hip. Claimant's medical history is significant in that she suffered a low back injury in 2003 while working for respondent. Claimant was diagnosed with severe bilateral foraminal stenosis at L4-5 and defects at L3-4, L2-3 and L1-2. A disk protrusion into the foramen on the right was identified at L4-5. Claimant underwent a bilateral foramenotomy at L3-4 and a discectomy with laminotomy on the left at L4-5, under the care of Douglas C. Burton, M.D. Claimant was released six months after the surgery with improvement of the radiating pain. However, claimant advised neurological surgeon Paul S. Stein, M.D., that she continued with intermittent buttock discomfort and numbness. Claimant continued to take Lortab as needed. At the time of the preliminary hearing, claimant denied post-surgery back pain or pain radiating into her right leg. Claimant testified that the back pain increased after the injury to her left foot and ankle. Claimant also alleged pain in her right hip after the injury.

Claimant was referred by her attorney to Dr. Stein for an evaluation on March 28, 2008. The history provided by claimant indicated claimant's abnormal gait after the foot injury increased her symptoms in both the low back and right hip. Dr. Stein agreed, finding that claimant's injury to her foot and ankle increased the symptoms in her right hip and low back. Dr. Stein noted that claimant had recently undergone an MRI of her lumbar spine and he had not been provided a copy of that film or the report. He requested a copy of either or both in order to make a reasonable diagnosis. In a follow-up report on June 23, 2008, Dr. Stein noted the receipt of the MRI scan. He also noted x-rays of claimant's right hip. After reviewing both, he determined that claimant had right hip and leg pain related to degenerative disease. The lumbar spine displayed postoperative right side changes at L4-5, but no evidence of recurrent disk herniation or nerve root compression was found.

Claimant was referred to independent medical evaluator John P. Estivo, D.O., by respondent's attorney for an evaluation on February 22, 2008. Dr. Estivo was also provided with claimant's history of injury to her foot and ankle. Claimant's treatment regimen was detailed in his report, along with the increased pain in claimant's right hip and low back. The preexisting back surgery was detailed and discussed. The physical examination revealed very limited range of motion in claimant's right hip. X-rays of the right hip displayed severe advanced degenerative joint disease to the right hip, which Dr. Estivo determined was preexisting.

Dr. Estivo found claimant's low back problems to have suffered no aggravations as the result of her left foot injury or altered gait. He did determine that claimant would most likely need a right hip replacement, but found this right hip problem to be a preexisting condition, not connected to the injury of July 19, 2006. He did not believe that claimant's left foot and ankle injuries and ongoing problems led to this degree of arthritis in the right hip. Additionally, when he examined claimant, she advised him that for several years, she had to walk with her right foot externally rotated in order to relieve her right leg pain. This right leg pain was also a preexisting condition, clearly symptomatic prior to the July 19, 2006, injury. The rotation was to compensate for the advanced arthritis in her right hip. When questioned by the court at the preliminary hearing, claimant initially denied this preexisting walking pattern, but then admitted to the fact. This unusual walking pattern was not discussed in Dr. Stein's report.

As the result of this medical opinion conflict, the ALJ referred claimant to independent medical evaluator Kris Lewonowski, M.D., for an independent medical examination (IME) on December 15, 2008. The injury history provided to Dr. Lewonowski is the same as that provided to Dr. Stein and Dr. Estivo. However, Dr. Lewonowski also discussed x-rays of claimant's right hip and low back performed at the request of Dr. Jansson, who identified bone on bone degeneration in the right hip. Claimant identified increased pain in the right hip and groin area connected with the increased activities associated with the boot and casting of her left foot. Dr. Lewonowski was advised of the prior low back surgery by Dr. Burton. February 22, 2008, x-rays of the right hip reveal significant degenerative osteoarthritis with significant loss of joint space, femoral head

and acetabular osteophytes and subchondral sclerosis. Dr. Lewonowski found claimant's complaints centered around the right hip degeneration. He opined that the degenerative osteoarthritis was not caused by the casting or the treatment for the left foot. Osteoarthritis of this nature requires many years to develop. The ALJ, after reviewing the report of Dr. Lewonowski, determined that claimant had failed to prove an aggravation or acceleration of the preexisting low back and right hip conditions.

### **PRINCIPLES OF LAW AND ANALYSIS**

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?<sup>1</sup>

K.S.A. 44-534a grants the administrative law judge the authority to determine a claimant's request for temporary total disability and ongoing medical treatment at a preliminary hearing. The Board's review of preliminary hearing orders is limited to specific issues as set forth in the statute.

Whether claimant suffered aggravation or an acceleration of the conditions in her low back and right hip are issues over which the Board takes jurisdiction on an appeal from a preliminary hearing Order.

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>2</sup>

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<sup>1</sup> K.S.A. 44-534a(a)(2).

<sup>2</sup> K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>3</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>4</sup>

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

... have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."<sup>5</sup>

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.<sup>6</sup>

Here, the record conflicts regarding the effect claimant's injuries on July 19, 2006, caused to her preexisting low back and right hip conditions. The medical opinion of Dr. Lewonowski persuaded the ALJ that claimant had failed in her burden. This Board Member agrees with that finding. The fact that claimant had undergone low back surgery, with ongoing, although limited, symptoms added to the unusual gait description contained in Dr. Estivo's report, shows a claimant with ongoing problems more significant than claimant was willing to acknowledge at the preliminary hearing. Claimant has failed to prove that her low back and right hip conditions were aggravated by the injuries on July 19, 2006, and the ongoing treatment thereafter. The denial of benefits by the ALJ is affirmed.

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<sup>3</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>4</sup> K.S.A. 2006 Supp. 44-501(a).

<sup>5</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

<sup>6</sup> *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>7</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

### **CONCLUSIONS**

Claimant has failed to prove that her preexisting low back and right hip conditions were aggravated or accelerated by the injuries suffered on July 19, 2006, or the subsequent treatment for those injuries. The denial of benefits by the ALJ is affirmed.

### **DECISION**

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Bruce E. Moore dated March 19, 2009, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May, 2009.

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HONORABLE GARY M. KORTE

c: Andrew L. Oswald, Attorney for Claimant  
Jennifer L. Arnett, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge

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<sup>7</sup> K.S.A. 44-534a.